RECENT DECISIONS.

ADMIRALTY—DUTY OF MASTER TO INJURED SEAMAN. A seaman in the course of his service broke his leg at sea, at a time when, had the ship put into the nearest port, it would have been delayed four or five weeks. There was no surgeon or anyone else experienced in the care of such cases on board. *Held*, it was the master's duty to put into the nearest port. *The Iroquois* (D. C., D. of Cal., 1902) 113 Fed. 964.

Congress early passed an act compelling ships to carry suitable medicine-chests, (1 Stats. at Larg. 134), and a similar statute exists in England. 7 & 8 Vict. c. 12. Though STORY, J., in *Harden* v. *Gordon* (1823) Fed. Cas. No. 6047, declared that the statute made no change in the law, the idea soon obtained that it limited the master's duty, so that, if a physician's services were necessary, the seaman's wages must bear the cost. *Holmes* v. *Hutchinson* (1833) Fed. Cas. No. 6639; *Pray* v. *Stinson* (1842) 21 Me. 402. But later cases have reverted to the view of STORY, J., and the question has come to be one of the reasonableness of the master's course. In accord with the principal case are *Whitney* v. *Olsen* (1901) 108 Fed. 292; *Brown* v. *Overton* (1859) Fed. Cas. No. 2024. *Contra* are *The Chandos* (1880) 4 Fed. 645, and *Peterson* v. *Swan* (N. Y. 1886) 21 J. & S. 151. See also for different aspects of the subject, *Scarff* v. *Metcalf* (1887) 107 N. Y. 211; *The Atlantic* (1849) Fed. Cas. No. 620.

BANKRUPTCY—LUNATICS. A lunatic by his committee filed a petition to be adjudicated a bankrupt. *Held*, the court had no jurisdiction to entertain the petition. *In the matter of Eisenberg*, (D. C., S. D. N. Y. 1902) N. Y. Law Journal, Sept. 29, 1902.

There is little if any authority on the subject. Lord ELDON, in an anonymous case in 13 Ves. Jr. 590, is reported to have said that lunacy was no defence to a commission of bankruptcy. In the case of *In re Farnham (a Lunatic)* [1895] 2 Ch. 799, the three judges who delivered opinions expressly left the question open and evidently considered it as one of great doubt. In *Ex Parte Stamp* (1846) 1 De Gex, Bankruptcy Cases, 345, *In Re Marvin* (1871) 1 Dillon C. C. Rep. 178, and *In Re Funk* (1900) 4 Am. Bank. Rep. 96, the courts held that a lunatic cannot commit an act of bankruptcy and a petition will not be entertained against him. In none of these cases is the question of voluntary bankruptcy decided and in one it is expressly left open. The decision of the principal case is based on the sections of the Bankruptcy Act and seems unassailable on any principle of statutory construction. The court finds that the case is not specifically provided for and is by implication excluded from the provisions of the Act.

CONSTITUTIONAL LAW—DIRECT TAXES—WAR REVENUE ACT OF 1898. *Held*, a tax on sales of shares of corporate stock is a tax on a business transaction and not a "direct" tax. *U. S.* v. *Thomas* (C. C., S. D. of N. Y. 1902) 115 Fed. 207.

This tax is contingent on the sale of the property. If the property is unsold, it bears no direct burden in connection with the tax. Hence, it is a tax on a business transaction rather than on property. Confusion has been caused by expressions in decisions involving other questions, in which the United States Supreme Court has held that a tax on a bill of lading was a tax on the goods, where they were to be shipped from a point within to a point without the State, *Almy* v. *California* (1860) 24 How. 169, 174; and where goods were to be exported, *Fairbanks* v. *U. S.* (1900) 181 U. S. 283; and in other cases dealing with the powers of Congress to tax exports or of

the States to tax interstate commerce. These cases are not analogous. Those expressions in them which indicate that such taxes are on property mean that the burden falls sufficiently upon the property to prevent its freedom of movement in interstate commerce or in export. What is really determined is that the taxes in question were upon interstate commerce or on exports, not that they were on property in the sense for which the defendant contended here.

CONSTITUTIONAL LAW—STATE REGULATION OF FOREIGN COMMERCE —POLICE POWER. A law of Louisiana empowered the State board of health to exclude healthy persons from entering diseased localities, whether such persons came from within or without the State. Under authority thereof immigrants from France were prevented from landing at New Orleans. *Held*, the act was constitutional as being within the police power of the State. *Compagnie Francaise* v. *Louisiana State Board of Health* (1902) 186 U. S. 380.

The decision illustrates the wide discretion allowed the States, even though a federal province incidentally is invaded, where the act is plainly a *bona fide* provision for the public welfare. The reasonableness of such a statute is always an element in considering whether there is a legitimate exercise of the police power. *Lake Shore R. Co.* v. *Ohio* (1898) 173 U. S. 285, 301. In view of the fact that the reasonableness—whether the enactment goes beyond the necessities of the case—is a question for the courts, *Railroad Co.* v. *Husen* (1877) 95 U. S. 465, 473, it is not surprising to find that the court is not unanimous in its conclusion.

CONSTITUTIONAL LAW—TERRITORIAL APPLICATION OF TREATY AS A JUDICIAL QUESTION. Plaintiff sought to escape a tax on imports by bringing himself within the provisions of a reciprocity treaty between France and the United States. The imports were from Algeria. Evidence was introduced to show on the one hand that the State Department did not consider Algeria a part of France, while, on the other hand, French officials said it was. *Held*, whether the treaty applied to Algeria was a judicial and not a political question, that it was to be settled by the laws of France, and therefore the plaintiff was within its provisions. *Tartar Chemical Co.* v. *United States* (C. C. S. D. of N. Y. 1902) 116 Fed. 726.

The effect of the decision is to thrust upon the State Department a treaty which it says it did not intend to make. It seems to conflict with *Foster* v. *Neilson* (1829) 2 Pet. 253; *Garcia* v. *Lee* (1838) 12 Pet. 511; *Williams* v. *Ins. Co.* (1839) 13 Pet. 415; and *In re Cooper* (1892) 143 U. S. 472. In the first of these cases, grants had been made by Spain of land in the territory of Louisiana, after the cession to France by the treaty of St. Ildefonso. If the Spanish opinion as to boundaries had been upheld, the grant would have been valid, but the court expressly refused to go into the question on the ground that it was political.

CONTRACTS—ACCORD AND SATISFACTION. An award in a controversy as to a contract to sell real estate, ordered that the grantor should execute a warranty deed. The grantor refused to execute anything but a quit-claim deed, which he left on deposit for the grantee to take. Being unable to consult the grantor, the grantee took the deed from the depositary under protest. *Held*, the grantee should be deemed to have taken the deed in full satisfaction of the contract. *Porter* v. *Cook* (Wis. 1902) 89 N. W. 823.

An accord and satisfaction requires an offer of something by one party as in full performance of his obligation, and an acceptance of the offer and receipt of the property by the other. The ascertainment of the true agreement of the parties is often a difficult question of fact; but if it appears, as in this case, that the offer is unequivocally conditioned on a discharge of the original obligation, receipt of the thing offered is necessarily conclusive

evidence of agreement to the condition and satisfaction of the contract. *McGlynn* v. *Billings* (1844) 16 Vt. 329; *Fuller* v. *Kemp* (1893) 138 N. Y. 231; *Perin* v. *Cathcart* (Ia. 1902) 89 N. W. 12.

CONTRACTS—CONFLICT OF LAWS—ILLEGALITY UNDER LAW OF PLACE OF PERFORMANCE. The defendant contracted with the plaintiff in New York for the carriage of four loads of laborers from the Barbadoes to Colon. After two loads had been carried the Barbadoes government prohibited the exportation of laborers. *Held*, the defendant was not excused from furnishing laborers for the remaining trips. *Tweedie Trading Co.* v. *James P. McDonald Co.* (D. C. S. D. of N. Y. 1902) 114 Fed. 985.

The decision is supported by the English authorities. *Blight* v. *Page* (1801) 3 B. & P. 295 (a); *Sjoerds* v. *Luscombe* (1812) 16 East, 201. But these cases seem anomalous. If the law of the place of contract governed, illegality under the foreign law, it is true, would be no excuse. *Jacobs* v. *Credit Lyonnais* (1884) 12 Q. B. D. 589. But "the essential validity of a contract is governed by the law with a view to which the contract was made, and this, in matters of performance, is the law of the place of performance." Moore's Am. note, Dicey on Conflict of Laws, p. 580. A change in the law of the place of performance should therefore excuse, just as, when the law of the place of contracting governs, a change in that law excuses, the parties being considered as contracting with a view to the existing law. *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180; *Cordes* v. *Miller* (1878) 39 Mich. 581. The case is not one of impossibility on account of fact, but of illegality; for the foreign law, when proved, is no longer a question of fact, but the law of the case. *Scrimshire* v. *Scrimshire* (1752) 2 Hagg. 395, 408, 416; and Lord STOWELL in *Dalrymple* v. *Dalrymple* (1811) 2 Hagg. 54, 58, 59.

CONTRACTS—PUBLIC POLICY—SECURING NOMINATION FOR OFFICE. The plaintiff agreed to use the influence of his newspaper to secure the defendant's nomination for a political office. *Held*, the contract was void, as against public policy. *Livingston* v. *Page* (Vt. 1902) 52 Atl. 965.

It has been held that any contract by which the vote of a citizen is bought, *Nichols* v. *Mudgett* (1860) 32 Vt. 546, or one's influence to secure another's nomination is procured, *Liness* v. *Hesing* (1867) 44 Ill. 113, or which contemplates the use of improper influence upon the voter, *Strasberger* v. *Burk* (Md. 1874) 22 Am. L. Reg. 607, is void. But an agreement to pay for open advocacy of the election of a candidate, *Murphy* v. *English* (N. Y. 1883) 64 How. Pr. 362, or for legitimate political work, *Sizer* v. *Daniels* (1873) 66 Barb. 426, is valid. By the New York penal code, any one who solicits money or other property from a candidate as a consideration for a newspaper or other publication supporting a candidate for an elective office, is guilty of a misdemeanor. § 41 bb.

CONTRACTS—SAVINGS BANKS—PAYMENT TO HOLDER OF DEPOSIT BOOK. A stipulation in a contract between a depositor and a savings bank provided that, "the institution will not be responsible for loss sustained when the depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment." The bank paid a person who had stolen the deposit book and represented himself to be the depositor, but it made no special inquiries and did not attempt to compare the thief's signature with the depositor's. *Held*, the bank was not protected by the stipulation, as it had been negligent in making the payment, and particularly in not having the depositor's signature at hand for comparison. *Ladd* v. *Augusta Savings Bank* (Me. 1902) 52 Atl. 1012.

It is well settled that a stipulation of the above character does not relieve the bank from liability for negligence. *Kummel* v. *Bank* (1891) 127

N. Y. 488. The novelty of the present case lies in the suggestion that a failure to compare signatures is negligence. *Gifford* v. *Bank* (1890) 63 Vt. 108, requiring no inquiry except where there are suspicious circumstances, is *contra*; but failure to make some attempt to identify the holder of the deposit book or examine and compare his signature is at least some evidence of negligence. *Brown* v. *Bank* (1893) 67 N. H. 549. It is sometimes said that the whole question of what is reasonable care is for the jury. *Wegner* v. *Bank* (1890) 76 Wis. 242.

CRIMINAL LAW—DOUBLE JEOPARDY. In a prosecution for assault with intent to kill, the defendent offered evidence of a previous conviction of battery for the same attack on the same person. *Held*, exclusion was error; for the conviction of battery was conviction of the included assault, and as this assault was also an included offense in the assault with intent to kill, trial on the second indictment would put the defendant in double jeopardy. *People* v. *McDaniels* (Cal. 1902) 69 Pac. 1006.

There is double jeopardy where the evidence, sufficient to support one indictment, would be sufficient to procure conviction of the offense charged in the other or of a lesser offense included therein. 1 Bish. Crim. Law, §§ 1051, 1054; Note in 58 Am. Dec. 533 ff.; *Fox* v. *State* (1888) 50 Ark. 528; *State* v. *Mikesell* (1886) 70 Ia. 176. But the difference in the offenses charged on the face of the indictments has sometimes led courts to ignore the double jeopardy as to an identical included offense. *State* v. *Caddy* (So. Dak. 1901) 87 N. W. 927. Double jeopardy as to an included offense has also resulted from the anomalous doctrine in some jurisdictions that a misdemeanor is merged in an including felony, and that prosecution for the lesser included offense is no bar to prosecution for the felony—a doctrine that seems to have grown out of a misapplication of the common law rule that on a trial for a felony there could be no conviction of an included misdemeanor. *State* v. *Hattabough* (1879) 66 Ind. 223. The well established rule that prosecution on an assault which afterwards results in death is no bar to a prosecution for the higher offense seems also to involve double jeopardy as to an included offense. *Reg.* v. *Morris* (1867) 10 Cox C. C. 480.

CRIMINAL LAW.—CONVICTION AFTER ACQUITTAL OF JOINT DEFENDANT. Three were indicted for conspiracy. A. pleaded guilty. *Held*, after acquittal of the two others, that A's plea could not be followed by judgment. *Rex* v. *Plummer* (1902) 2 K. B. 339.

Three were indicted for riot and demanded separate trials. A. was convicted. *Held*, after acquittal of the two others, that judgment upon the verdict should be pronounced against A. *Simmons* v. *Territory* (Okl. 1902) 69 Pac. 787.

The two cases are not inconsistent. In the former the plea of guilty did not make the trial any the less a joint one. The rule that, where several are indicted and tried together for a crime the essence of which is their combined action all must be convicted or acquitted, was correctly applied. It is interesting to note, however, that exactly the same question was presented in *Reg.* v. *Gallagher* (1875) 13 Cox C. C. 61, but the Court of Criminal Appeal sustained a conviction without noticing it. In the Oklahoma case the rule was applied that reasons in arrest of judgment must be found in the record. It is evident that the indictment, though joint, may logically be considered as belonging separately to each record when the trials are entirely distinct, as though there were three similar indictments. The court reached the same result through the view that the indictment was not part of the record at all in case of a separate trial.

EQUITY—INJUNCTIONS—LACHES. The defendant built houses so that they projected several feet into a highway. The plaintiff after the completion of the buildings applied for a mandatory injunction to have the build-

ings removed on the ground that they interfered with his easements in the highway in regard to an adjoining lot. *Held*, the plaintiff was not estopped to demand this relief by waiting until the buildings were completed before objecting. *Ackerman* v. *True* (1902) 71 App. Div. 143.

The question is, will the court grant the remedy where the plaintiff has not been prompt in demanding relief, rather than whether the plaintiff is estopped to demand it. The general rule is that when the plaintiff stands by and allows the defendant to make large expenditures and does not object, the injunction will not be granted. *City of Logansport* v. *Uhl* (1884) 99 Ind. 531. But an injunction will issue where objections have been made to the defendant while the building was being constructed. *Linzee* v. *Mixer* (1869) 101 Mass. 512; *Lonsdale Co.* v. *Woonsocket* (1899) 21 R. I. 498. Where a public right is being enforced, the injunction will be granted though no objection is made before the building is completed. *Attorney General* v. *Algonquin Club* (1891) 153 Mass. 447; *Missouri* v. *Illinois* (1901) 180 U. S. 208. The principal case, if all the facts are stated, seems to go farther than most of the decisions. See also *Barney* v. *Rapid Transit Com.* (1902) 38 Misc. 549.

EQUITY—INJUNCTION—STRIKES—RIGHT OF ACTION. The defendants, who were not employees of the plaintiffs, conspired to induce the plaintiffs' servants to strike, and to prevent others from taking their places, by picketing. The plaintiffs' servants were not bound to the plaintiffs by contract. *Held*, the defendants were inflicting a wrong on the plaintiffs which equity would enjoin. *Frank* v. *Herold* (N. J. 1902) 52 Atl. 152.

The defendants, non-residents, conspired to effect a strike within a certain locality and to prevent, by intimidation, other laborers from taking the places of the strikers. The plaintiff was mortgagee of the property affected by the strike. *Held*, the defendants would be enjoined. *United States ex rel. Guaranty Trust Co.* v. *Haggerty* (C. C. D. of W. Va. 1902) 116 Fed. 510. See NOTES, p. 552.

EQUITY—JURISDICTION OVER CRIMINAL PROCEEDINGS. Complainant sought to enjoin criminal proceedings under a statute, alleged to be unconstitutional, on the ground that it injured him in his property. *Held*, a court of equity has no jurisdiction to enjoin criminal proceedings. *Davis & Farnum Mfg. Co.* v. *Los Angeles* (C. C. S. D. Cal. 1902) 115 Fed. 537. See NOTES, p. 550.

EQUITY—PROPERTY—EXCHANGE QUOTATIONS. *Held*, the Chicago Board of Trade has a property right in the quotations made on its exchange by the transactions of its members and gathered through the agency of its employees. In the absence of legislation, the court cannot declare these quotations to be so affected by public interest that their distribution is under public control. Since the rules of the exchange forbid gambling and a vast amount of legitimate business is done, the fact that gambling may occur will not prevent the entrance of the plaintiff into a court of equity in order to protect this property right. *Chicago Board of Trade* v. *Christie Grain and Stock Co.* (C. C., W. D. Mo. 1902) 116 Fed. 944. See NOTES, p. 549.

EQUITY—TRUSTS—ACCOUNTING—PARTIES. Testator devised property in trust for his daughter during her life, and upon her death to her children, and, if she left no descendants surviving, then to his next of kin. The trustee, at the instance of the daughter, allowed her to manage and waste the property and finally transferred it to her, taking a release executed by her and her children. Thereafter the daughter was substituted as trustee under the will and sued for an accounting by the former trustee.

Held, as she had taken part in the breaches of trust, it would be inequitable to make defendant account to her even for the benefit of a contingent remainderman. *Woodbridge* v. *Bockes* (1902) 170 N. Y. 596.

Though the plaintiff sued merely as trustee, she was properly barred from maintaining any action on behalf of herself or her children, by reason of her own maladministration and the release to the trustee. *Brice* v. *Stokes* (1805) 11 Ves. Jr. 319. The contingent remainderman, however, although not expressly a *cestui* under the will, was the beneficiary of an implied trust to keep the fund intact during the continuance of the particular estate and had a right to an accounting. *Sherman* v. *Parish* (1873) 53 N. Y. 483, 493. The trustee was not precluded from suing in his behalf by her own misconduct. *Wetmore* v. *Porter* (1883) 92 N. Y. 76. Any hardship to the defendant, it seems, could have been prevented by ordering the remainderman to be brought in as a party defendant under Code Civ. Proc. § 452, and making a final settlement of the matter in the pending action, according to the usual equitable rule. *Sherman* v. *Parish*, *ubi supra*. The dissenting opinion of BARTLETT, J., therefore appears preferable.

EVIDENCE—ADMISSIONS OF FORMER OCCUPANT OF LAND. In ejectment for part of a parcel of land, where the defence was adverse possession, it appeared that the defendant, being in possession, had orally contracted with one W. to sell him the whole parcel and had let him into possession. After W's death the defendant reentered. *Held*, statements made by W., while in possession, that he did not claim the part now in litigation, were admissible in evidence against the defendant. *Walsh* v. *Wheelwright* (Me. 1902) 52 At. 649.

Whether W. was tenant at will or licensee, he was not the defendant's predecessor in title. Yet some courts, following a suggestion in 1 Greenl. Ev. § 109, hold that such statements, made by a tenant, are admissible as part of the *res gestæ*. *Rankin* v. *Tenbrook* (Pa. 1837) 6 Watts 388; *Marcy* v. *Stone* (1851) 8 Cush. 4. On this manifestly erroneous theory it should make no difference whether or not the declarant is dead at the time of trial, yet it has been held that, if he is alive, evidence of such statements is inadmissible. *Currier* v. *Gale* (1860) 14 Gray 504. Furthermore, such declarations by a life tenant are not admitted to prejudice the cause of a remainderman, *Hill* v. *Roderick* (Pa. 1842) 4 W. & S. 221, or to show a change in the landlord's title. *Bell* v. *Adams* (1879) 81 N. C. 118. The sounder rule excludes all such declarations by a tenant or licensee. *Papendick* v. *Bridgwater* (1855) 5 E. & B. 166; and see *Hendricks* v. *McDaniel* (1887) 80 Ga. 102.

QUASI CONTRACTS—PAYMENT BY MISTAKE—FORGED BILLS OF LADING. A draft, with forged bills of lading attached, was directed to the plaintiff to pay and charge to account of certain flaxseed. Plaintiff accepted "against indorsed bills of lading" and paid the draft to the defendant, a holder for value, before the forgery was discovered. *Held*, the acceptance being conditional on the delivery of genuine bills of lading, the plaintiff could recover. *Guaranty Trust Co.* v. *Grotrian* (C. C. A. 2nd Circ. 1902) 114 Fed. 433.

The case is to be distinguished from *Hoffman* v. *Bank* (1870) 12 Wall 181. In that case the drawee had accepted the draft unconditionally, and the forged bills of lading were not referred to in the body of the instrument or in the acceptance. The court held the acceptor could not recover, since the payment by him to the payee had been a payment in discharge of his legal obligation as acceptor and not a payment by mistake. But in the principal case the drawees qualified their acceptance and paid the money on the new conditional contract created by their acceptance and consented to by the defendant. Therefore the case falls within the rule that money paid under a mistake of fact may be recovered.

REAL PROPERTY—ADVERSE POSSESSION—INTERRUPTION BY SUBMERGENCE. The defendants had held possession adversely to the plaintiff's title for several years, when a river submerged the land. After the statutory period had run the land formed again and the defendants claimed they had acquired title. *Held*, dispossession by *vis major* had the same effect as voluntary abandonment; during the submergence the constructive possession was, if anywhere, in the true owners. *Secretary of State* v. *Krisnamoni*. [1902] A. C.—(P. C.)

The decision seems sound, as the burden is on a disseisor to prove actual possession for twenty years. The question appears to have arisen only once in this country, when it was likewise held that the period of submergence could not be counted in favor of the disseisor. *Western* v. *Flanagan* (1893) 120 Mo. 61. There was a dictum in that case that title might be gained by continuing the adverse possession, after the land had reappeared, to make a total number of years equal to the statutory period; but that is unsound, as adverse possession must be continuous. *Sawyer* v. *Kendall* (1852) 10 Cush. 241. For the same holding on dispossession by military order see *Holliday* v. *Cromwell* (1872) 37 Tex. 437.

REAL PROPERTY—COVENANTS RUNNING WITH INCORPOREAL RIGHTS. The plaintiff and defendant B entered into an agreement under seal, called a lease by the parties thereto, whereby the defendant B was to take water from the plaintiff's canal for a number of years for the purpose of flooding an ice pond, and was to pay a certain sum therefor. The right to take the water could not be assigned without the plaintiff's assent. The defendant B, with the assent of the plaintiff, assigned the right to defendants J and C, who took the water for a number of years and paid the agreed price and then refused to take any more water or pay the money. Plaintiff sued B, J and C. *Held*, the defendant was granted an easement for years by the instrument and the burden of the covenant to pay the money would run with the assignment of the easement. *Jordan* v. *Indianapolis Water Co.* (Ind. 1902) 64 N. E. 680. See NOTES, p. 554.

REAL PROPERTY—INEFFECTIVE GRANT—IMPLIED TRUSTS. A conveyance of a parcel of land was made "to the inhabitants of the Third and Fourth school districts in the town of Weathersfield, their heirs and assigns forever," to be held by them "so long as used for the sole purpose of a burying-ground." In a bill in equity by certain of said inhabitants to restrain trespasses on the property it was *held*, while the grant was too indefinite to pass title, the court would preserve the interests of the inhabitants by appointing trustees to hold the legal title. *Hunt* v. *Tolles* (Vt. 1902) 52 Atl. 1042.

The court cites, as its only direct authority, *Bailey* v. *Kilburn* (1845) 10 Met. 176. That was a case of a grant "for the use of a schoolhouse," no grantee being named. Trustees were appointed because a "trust was created, according to the terms of the deed." Manifestly, it affords no precedent for the decision at issue, wherein no attempt at the creation of a trust was made. The logical consequence of the result reached would be the enforcing as a trust of any ineffective grant of land. Universally the heirs have been recognized where the grantees were similarly incompetent. *Jackson* v. *Cory* (1811) 8 Johns. 385, in which the deed was to "the people of the County of Otsego"; *Hornbeck* v. *Westbrook* (1812) 9 Johns. 73, where a profit was granted to "the inhabitants of Rochester."

REAL PROPERTY—RESERVED EASEMENTS—COVENANT AGAINST INCUMBRANCES. A. granted land, retaining a portion on which stood a house with windows overlooking the land granted. The grant contained a covenant against incumbrances. *Held*, intention to reserve an easement of light was negatived by the covenant against incumbrances. *Denman* v. *Mentz* (N. J. 1902) 52 Atl. 1117.

The New Jersey courts will imply an easement by reservation as well as by grant where the user is continuous and apparent. *Seymour* v. *Lewis* (1861) 13 N. J. Eq. 439; *Toothe* v. *Bryce* (1892) 50 N. J. Eq. 589. In extending this doctrine to easements of light, *Sutphen* v. *Therkelson* (1884) 11 Stew. 318, they are still further opposed to the great weight of authority in this country. *Mullen* v. *Stricker* (1869) 19 Ohio St. 135; *Robinson* v. *Clapp* (1895) 65 Conn. 365. It was necessary, therefore, in the principal case to consider the effect of the covenant against incumbrances. Any presumed intention to reserve seems amply met by this covenant on the same principle that an express covenant will override an implied covenant. *Carbrey* v. *Willis* (1863) 7 Allen, 364.

REAL PROPERTY—WATER—RIGHTS IN GROSS. The plaintiff was the lessee of water rights from a company which had been granted by the legislature power to let water, but he was not a riparian owner. The defendant polluted the river from which the water was taken. *Held*, the plaintiff had a right of action, as the statutory authority granted the company to let water created property rights in gross in the lessees. *Doremus* v. *Mayor, etc., of City of Paterson* (N. J. 1902) 52 Atl. 1107.

The common law rule is that non-riparian owners can have no property rights in streams for the infringement of which they can sue anyone except the parties contracting with them. *Hill* v. *Tupper* (1863) 2 H. & C. 121; *Stockport Waterworks Co.* v. *Potter* (1864) 3 H. & C. 300; *Ormerod* v. *Todmorden Mill Co.* (1883) 11 Q. B. D. 155. Exceptional cases, it is true, have declared rights in gross exist in water in the absence of legislative action. *Goodrich* v. *Burbank* (1866) 12 Allen, 459. It is certainly competent for the legislature to create rights in gross in non-riparian owners, if that was the correct construction of the power to lease. It had been previously held in New Jersey that a person in the plaintiff's situation has a property right, for which he is entitled to compensation, when the water is diverted under the power of eminent domain. *Butler Rubber Co.* v. *Newark* (1897) 61 N. J. L. 32.

TORTS—DUTY TO TRESPASSER—VOLUNTARY RISK. Defendant, to protect his fish preserve, employed a night watchman, who was in the habit of firing a gun into the air to scare off trespassers. Plaintiff, with knowledge of this fact, entered the preserve to poach and was injured by a bullet fired by the watchman in the direction of the noise made by the plaintiff. *Held*, it was error not to charge that if the plaintiff voluntarily exposed himself to a known danger he could not recover, even though the watchman's act was without due care. *Magar* v. *Hammond* (1902) 171 N. Y. 377.

Voluntary assumption of risk may lessen the duty of due care towards the person so assuming it on the ground that one is not ordinarily required to provide against another's running into danger with his eyes open. "*Volenti non fit Injuria* in Actions of Negligence," 8 Harv. L. Rev. 457. If the decision merely stands for this it is based on a sound principle. But on the facts as found by the jury it may well be taken to go further and to hold that the voluntary running of a risk by the plaintiff may be a defence even where the defendant knows or has reason to know that the plaintiff is in danger and yet acts wantonly and recklessly to his injury. This would be doubtful ground and unsupported by authority except perhaps by *Illot* v. *Weeks* (1820) 3 B. & Ald. 304.

TORTS — INJURY CAUSING DEATH ON THE HIGH SEAS — JURISDICTION. The plaintiff's intestate, a passenger on the defendant's steamship, was washed overboard and drowned on the high seas, through the negligence of the defendant. The ship was registered in the port of New York. *Held*, the plaintiff might maintain an action under N. Y. Code Civ. Proc. § 1902, since the tortious act was committed on the

vessel, and hence within the territory of the State of New York. *Lindstrom* v. *International Navigation Co.* (C. C. E. D. of N. Y. 1902) 117 Fed. 170.

This is in accord with the weight of authority. *McDonald* v. *Mallory* (1879) 77 N. Y. 546; *The Lamington* (1898) 87 Fed. 752. The contrary view was reached in *Armstrong* v. *Beadle* (1879) 5 Sawyer, 484, but the decision there was based on cases where in each instance the tort had been committed after the parties had come within another jurisdiction. In the principal case great emphasis is laid on that distinction; the vessel remains within the jurisdiction of its hailing port until it comes under the jurisdiction of some foreign sovereign.

TORTS — NEGLIGENCE — CARE DUE TO CHILDREN. Defendant, an ammunition manufacturer, dumped refuse powder in his adjoining lot, where children were accustomed to play. Some boys took a cake of this powder into the street and, in extracting brass shells imbedded in it, exploded it to the damage of plaintiff, a boy who had joined them. *Held*, it was a proper question for the jury whether the defendant had used due care in thus placing inherently dangerous material in a spot frequented by children; the mere intervention of a human agency such as the defendant should have apprehended and provided against did not break the chain of causation. *Travell* v. *Bannerman* (N. Y. 1902), 71 App. Div. 439.

The decision is in accord with a suggestion of Judge COOLEY, that if one throw away on his premises things tempting to children it is equivalent to an invitation to them to make use of them, Cooley, Torts (2d Ed.) 356, and with the doctrine that where one puts something dangerous and alluring on his land the peculiar proclivities and instincts of children bear on the question of negligence. *Powers* v. *Harlow* (1884) 53 Mich. 507; *Harriman* v. *R. R. Co.* (1887) 45 Ohio St. 11. In the New York "turntable" case, *Walsh* v. *R. R. Co.* (1895) 145 N. Y. 301, the court did not expressly dissent from this doctrine, but said that it was inapplicable to the facts before it.

TORTS—CARE OF PREMISES—IMPLIED INVITATION. A mining corporation erected dwelling houses on a tract owned and mined by it. It established no regular roads over the same, but required residents and their visitors to cross at any point most convenient. The plaintiff, after visiting one of the houses, returning by a worn path, fell into a concealed shaft. *Held*, the plaintiff could recover on theory of implied invitation.—*Foster* v. *Portland Gold Mining Co.* (C. C. A. 8th Circ. 1902) 114 Fed. 613.

The issue raised by demurrer was whether, on the facts as stated, there was an implied invitation. Where there is no express invitation the weight of authority seems to say that an invitation can only be implied where the person came on for some purpose for which the premises were used; in short, where there is an element of benefit expected by the owner. On this principle the following are mere licensees: one on his own private business, *Plummer* v. *Dill* (1892) 156 Mass. 426; one seeking employment, *Larmore* v. *Crown Point Iron Co.* (1886) 101 N. Y. 391; one attending a wake uninvited, *Hart* v. *Cole* (1892) 156 Mass. 475. As the complaint in the principal case failed to show what the object of the plaintiff's visit was, either the decision conflicts with these authorities or the court raised an unwarranted presumption of invitation.

TORTS—NUISANCE—ACTION BY LESSEE. A tenant was seriously disturbed in her enjoyment of the premises by the vibration caused by an electric light station and by smoke and cinders issuing therefrom. *Held*, she could recover the damages sustained by reason of the nuisance, although the premises had been leased to her during its existence. *Bly* v. *The Edison Electric Illuminating Co.* (1902) 172 N. Y. 1. See NOTES, p. 547.

TORTS—NUISANCE—MAINTENANCE OF EXPLOSIVES. A powder magazine maintained by the defendants was maliciously fired by a third party. *Held*, the defendants were liable for damages to the plaintiff, a neighbor. *Kleebauer* v. *Western Fuse & Explosives Co.* (Cal. 1902) 69 Pac. 246.

The jury found the maintenance to be a nuisance *per se*. The decision, therefore, may be based on the rule that one is liable for the consequences of a nuisance, whether negligence is shown or not, but it goes a step further than previous cases, as the proximate cause here was the act of a malicious third party. The reliance placed on *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, is, however, erroneous. Were the doctrine of that case applied here the decision must be for the defendant, for where that rule is accepted its use is very much limited. For example, where the proximate cause of the damage was a third party's act there is no liability. *Wilson* v. *Newberry* (1871) L. R. 7 Q. B. 31. Or *vis major*, *Nichols* v. *Marsland* (1875) L. R. 10 Ex. 255. But in this country *Rylands* v. *Fletcher* has been largely repudiated and the rule as to such a state of facts generally accepted is that where the collecting and keeping of things on one's land, though likely to become dangerous, is lawful and does not, therefore, constitute a nuisance, no damage resulting therefrom will sustain an action except upon proof of negligence. *Losee* v. *Buchanan* (1873) 51 N. Y. 476; *Brown* v. *Collins* (1873) 53 N. H. 442. The decision in the principal case must, therefore, rest entirely on the finding of a nuisance by the jury, a question not involved in *Rylands* v. *Fletcher*.

TORTS—RELEASE—JOINT TORTFEASORS. In an action against one joint tortfeasor the defendant set up an agreement of the plaintiff with the other purporting to release that other, for a consideration, from all his liability on the joint tort, but expressly reserving the plaintiff's claim against the defendant. *Held*, the whole liability on the tort was extinguished and no rights remained to be reserved against the defendant. *Abb* v. *Northern Pac. R. Co.* (Wash. 1902) 68 Pac. 954.

Where in a release to one joint tortfeasor a proviso reserves rights against the other, in some jurisdictions the proviso is held void for repugnance to the primary object of the instrument. *Gunther* v. *See* (1876) 45 Md. 60; *Ruble* v. *Turner* (Va. 1808) 2 Hen. & Munf. 38. In others, to give effect to the supposed intention of the parties, the release is treated as a mere covenant not to sue. *Matthews* v. *Chicopee Mfg. Co.* (N. Y. 1865) 3 Robt. 711. There is the same divergence where there is a similar proviso in an agreement to release for a consideration. American cases usually treat this as an accord and satisfaction and hold that the satisfaction having passed the whole liability on the tort is extinguished. *Brown* v. *Kencheloe* (Tenn. 1866) 3 Cold. 192; *Ellis* v. *Bitzer* (1825) 2 Ohio, 262; *Mitchell* v. *Allen* (1881) 25 Hun. 543. In England and West Virginia, on the other hand, the agreement is construed as an agreement not to sue the tortfeasor with whom it is made. *Duck* v. *Mayen* [1892] 2 Q. B. 511, *Bloss* v. *Plymale* (1869) 3 W. Va. 393.